

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-1311

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 74-1311

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER
FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its
ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the Army,
Department of Defense, U.S.A., LT. GENERAL WILLIAM C.
GRIBBLE, individually and as Chief of Engineers, Corps of
Engineers, U.S. Army and COL. HARRY W. LOMBARD, individ-
ually and as District Engineer, New York District, Corps of
Engineers, U.S. Army,

Defendants-Appellees,

and

CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendant-Appellant.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., DEFENDANT-APPELLANT

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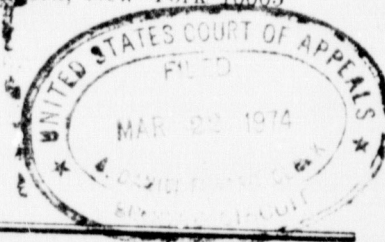


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Case No. 74-1311

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Plaintiffs-Appellees,

—against—

HOWARD H. CALLAWAY, *et al.*,

Defendants-Appellees,

and

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

BRIEF OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., DEFENDANT-APPELLANT

Issue Presented

Whether Con Edison, a licensee of the Federal Power Commission with authority to construct the Cornwall pumped storage project, is required to obtain a permit to discharge dredge and fill material from the Corps of Engineers under §404 of the Federal Water Pollution Control Act Amendments of 1972 in addition to its FPC license, in order to place, lawfully, rock and dredged material into the Hudson River as part of the construction work necessary to build certain of the licensed project works?

Nature of the Case

This is an appeal from a final judgment of the District Court, Southern District of New York, Lasker, J., pursuant to 28 U.S.C. §1291. The Court's memorandum opinion is reproduced in the joint appendix to the record at R. 135a.*

Proceedings Below

Plaintiffs, Scenic Hudson *et al.* (hereinafter called "Scenic Hudson"), commenced this action on October 9, 1973 with service on Consolidated Edison Company of New York, Inc. (hereinafter called "Con Edison") and defendants Callaway *et al.* (hereinafter called the "Corps") a summons, complaint and motion for preliminary injunction to prevent Con Edison from commencing construction of the Cornwall pumped storage project (hereinafter called the "Project"). The Project is a hydroelectric facility to be constructed on the west bank of the Hudson River in and near the Village of Cornwall, New York. The Federal Power Commission ("FPC") licensed Con Edison to construct and operate the Project in a license order issued on August 19, 1970, and effective on October 1, 1970.** Scenic Hudson's complaint in the District Court demanded

* The designation "R." refers to pages of the joint appendix to the record.

** The FPC license order was upheld on a petition for review in this Court. *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (1971) *cert. denied* 407 U.S. 926 (1972) [*Scenic Hudson II*]. The 1970 license order was issued following an earlier remand of this Court. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (1965) *cert. denied* 384 U.S. 941 (1966) [*Scenic Hudson I*].

injunctive and declaratory relief, alleging that Project construction should not go forward unless and until Con Edison obtained, in addition to its FPC license, two permits from the Corps of Engineers. These were alleged to be a permit under §10 of the Rivers and Harbors Appropriation Act of 1899 ("the 1899 Act") (33 USCA §403) and another permit under §404 of the 1972 Water Act (33 USCA §1344).

Without filing an answer, the Corps moved to dismiss the complaint. It asserted (correctly) that a §10 permit is not required since §10 of the 1899 Act was superseded as to FPC licensed project works upon enactment of the Federal Water Power Act of 1920 (16 USCA §791a *et seq.*). The Corps further alleged that Con Edison was required to obtain a §404 permit, even though the Corps had previously ruled in letters to Con Edison of April 3, 1973 (R. 78a) and to Scenic Hudson of March 27, 1973 (R. 34a) that such a §404 permit was not required. The Corps further contended that, since it agreed with Scenic Hudson that a §404 permit was needed, there was no dispute and the §404 issue had therefore become moot (R. 82a, 87a).

Con Edison answered the complaint, counter-claimed against Scenic Hudson, and cross-claimed against the Corps. Con Edison asked for a declaratory judgment that neither a §404 nor a §10 permit was required. Con Edison moved for summary judgment, showing that the Corps had participated in the FPC licensing proceeding under §4(e) of the Power Act (16 USCA §797(e)), and that the provisions of that act had superseded the provisions of §10 of the 1899 Act insofar as the construction of FPC licensed hydroelectric projects is concerned.

Con Edison further contended, that since the Power Act had deliberately vested exclusive federal jurisdiction over private hydroelectric developments in the FPC (to do away with duplicative and piecemeal licensing of such facilities), the 1972 Water Act and §404 thereof were not intended to impose conflicting Corps jurisdiction upon construction of FPC licensed projects. In addition, Con Edison pointed out that even if Congress had intended in 1972 to partially repeal or alter the scope of the FPC's jurisdiction under the Power Act, such repeal by virtue of §28 of the Power Act could not be applied retroactively to Con Edison's Cornwall Project license, which was issued in 1970. Section 28 of the Power Act (16 USCA §822) proscribes such retroactive repeal or alteration by providing that no amendment or repeal thereof shall affect any license theretofore issued, or the rights of any licensee thereunder.

Scenic Hudson cross-moved for summary judgment and the case was argued on the merits before Judge Lasker on November 1, 1973.

The Decision and Judgment Below

By memorandum filed December 28, 1973 (R. 135a), Judge Lasker held that a permit under §10 of the 1899 Act is not required, but that Con Edison should obtain a §404 permit with respect to such Project construction activities as will involve the discharge of dredged and fill material into the Hudson River. Accordingly, a judgment was entered, January 7, 1974 (R. 159a), which:

(a) declared that Con Edison was not required to obtain a §10 permit in connection with construction of the Project, and

(b) declared that Con Edison is required to seek and obtain a Corps permit under §404 prior to commencing to discharge dredged and fill material into the Hudson River in connection with construction of the Project, and enjoined Con Edison from discharging dredged and fill material unless and until it receives a §404 permit.

Con Edison initiated this appeal on the question whether the judgment below is correct insofar as it requires that a §404 permit be obtained. This brief presents the issues on Con Edison's appeal. Scenic Hudson has cross-appealed on the §10 issue. Con Edison will answer Scenic Hudson's arguments on the §10 issue in a subsequent brief.

The Construction Work Subject to the Injunction

A description of the physical features of the Cornwall Project and its purpose is contained in Mr. McElwee's affidavit (R. 50a)* and in this Court's opinions in *Scenic Hudson I* and *Scenic Hudson II* (see 354 F.2d at 611 and 453 F.2d at 465-466). Briefly stated, the Project will consist of an upper reservoir, located approximately 1,000 feet above sea level (about a mile inland) in Orange County, a 10,000 foot tunnel connecting the upper reservoir to an underground hydroelectric powerhouse at the River shoreline, a tailrace connecting the powerhouse with the River, a submarine transmission line beneath the River, and a Project recreational park facility.

The Project will operate by pumping water from the Hudson River up the tunnel into the reservoir, where it will be stored, and then released at times of peak electric

* See maps at R. 62a.

system demand to provide electricity. Reversible pump-generators in the underground powerhouse will both pump the water up and generate the on-peak electric energy. The pumping energy will be provided by efficient base-load generating facilities during off-peak hours, that is late at night and on weekends. The electricity generated will be available "on-peak" to provided needed reliability and peaking power at times when the system demands for power are most severe (see 44 FPC at 362-368; *Scenic Hudson II*, 453 F.2d at 466).

The FPC license for project construction includes a requirement that a recreational park* facility be constructed along the shoreline of the Village of Cornwall (see R. 56a-57a).** The recreational park, of about 57 acres, will be constructed with approximately 1.74 million cubic yards of rock excavated from the underground powerplant and tunnels. The rock will be placed in the River and along the shoreline to an elevation of about nine feet above high water. On top of this rock material there will be placed some 144,000 cubic yards of earth and 315,000 cubic yards of dredged material. The earth will be excavated from the plant site on land. The dredged material will be excavated in the course of construction of the plant tailrace and transmission line crossing in the river (R. 56a).

* Section 10(a) of the Power Act requires "That the project adopted . . . will be best adapted to a comprehensive plan for improving or developing a waterway for . . . [*inter alia*] beneficial public uses, including *recreational purposes* . . .". The plans for construction of the park were affirmed by this Court in *Scenic Hudson II* (453 F.2d at 466, 475, 480, and 481).

** See FPC license Article 37 (44 FPC at 435); see also *infra*, at 16-17.

The placement or "discharge" of this rock, earth and dredge material, necessary to create the Project park facility, is the principal target of the injunction issued below. It is asserted that, since this rock requires a "discharge" of "dredge and fill material", it is subject to §404 of the 1972 Water Act.*

In addition to the work necessary to build the park, Con Edison's construction plans also require temporary placement of some 60,000 cubic yards of rock between sheet-pilings driven into the River bottom immediately in front of the tailrace structure. These sheet-pilings and rock will create a cofferdam structure, which will create a small impoundment on its land side, across which the existing Penn Central railroad tracks will be temporarily rerouted. The impoundment will be unwatered, thus permitting the

* §301 of the 1972 Water Act, discussed more fully *infra*, at 24-26, provides:

"Except as in compliance with . . . §404, the discharge of any pollutant by any person shall be unlawful".

Under §404(a):

"The Secretary of the Army, acting through the Chief of Engineers, may issue permits . . . for the discharge of dredged or fill material into the navigable waters of specified disposal sites."

The terms "discharge" and "pollutant" are defined in §502:

"(6) The term 'pollutant' means dredged spoil, solid waste . . . rock, [or] sand . . . discharged into water . . .".

"(16) The term 'discharge' . . . includes a discharge of a pollutant . . ."

"(12) The term 'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source . . .".

"(14) The term 'point source' means any discernible confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . container, rolling stock . . . or vessel from which pollutants may be discharged."

tailrace for the Project to be excavated in a dry area. Upon completion of the tailrace tunnels, forebay, and new railroad bridge and screen structure, the cofferdam sheet-piling will be removed and the 60,000 cubic yards of cofferdam material, plus some 20,000 yards of additional material, will be excavated and placed above water level in the recreational park area (R. 56a). This temporary placement of rock into the River, although essential in order to construct the licensed Project, is also a target of the injunctive decree, on the theory that it constitutes a "discharge".

Finally, the underwater transmission line facility, which will be placed across the River in a shallow trench, will be backfilled with a specially selected and screened sand. Also, it is necessary to fill temporarily a small section of River shoreline between the underground powerhouse and the recreational park area in order to construct a haul road, across which construction equipment will transport excavated material to the park. Presumably these relatively minor and temporary filling activities are also subject to the injunctive decree against any discharge of material in connection with Project construction.

Background of the Case

This Court is aware of the Cornwall Project's eleven year legal history.* Following this Court's decision in *Scenic Hudson I*, remanding the licensing proceeding to the FPC, there took place five years of intensive FPC hearings and investigation, which resulted in the Commission's licensing order of August 19, 1970.** That order was upheld on

* A summary is contained in the Bergen affidavit, R. 40a.

** The FPC's license order and opinion is reported at 44 FPC 359, *et seq.*

appeal to this Court in *Scenic Hudson II*. The Court then concluded that the FPC had complied with the specific directives of the 1920 Water Power Act and the National Environmental Policy Act of 1969 (NEPA) (42 USCA 4321 *et seq.*), had made exhaustive environmental findings, and had satisfied the Court's mandate in *Scenic Hudson I*.

Following the *Scenic Hudson II* decision, Con Edison applied for and, after hearings, was issued a "water quality certificate" for the Project by the New York State Department of Environmental Conservation.* *Scenic Hudson* unsuccessfully appealed New York State's determination to issue the water quality certificate through the State Courts. See *deRham v. Diamond*, 32 N.Y.2d 34 (1973). In that decision, Chief Judge Fuld observed, on the basis of the evidence of record, that:

"Construction of the Project, it is true, will involve a certain amount of dredging and will require the deposit of rock excavated from the Project powerhouse and tunnels to be made along the water front near the Village of Cornwall. Such dredging and deposit of rock will involve the addition of a certain amount of temporary turbidity to the River water in the immediate vicinity of construction but none of this turbidity will be attributable to sewage, industrial waste or other waste and, after a reasonable opportunity for mixing, these particles will not be readily feasible, if at all present". (32 N.Y.2d at 46).

Later in 1973, *Scenic Hudson* and the Hudson River Fishermen's Association, another environmental group

* The water quality certificate became necessary upon enactment of §21(b) of the Water Quality Improvement Act of 1970, P.L. 91-224, effective April 3, 1970, prior to the issuance of the license in August 19, 1970. Section 21(b) required that Con Edison file the water quality certificate within one year after issuance of the license.

which has long opposed construction of the Project, petitioned the FPC for further hearings with respect to the proposed Project design and operating procedures in the interest of fishery protection. After considering the petitions and other materials provided, the Commission denied those petitions in the spring and summer of 1973. Scenic Hudson and the Fishermen petitioned for review in this Court, and the matter was argued in this Court on February 11, 1973 (*Hudson River Fishermen's Association et al. v. FPC*, Docket Nos. 73-2258, 73-2259).

The foregoing outline of the litigation related to the Project highlights the extensive difficulty which has confronted Con Edison in attempting to build the Cornwall Project. But the FPC license obligates Con Edison to commence actual construction of the Projects works by October 1, 1974, or suffer the consequence of termination of its license by reason of the provisions of §13 of the Power Act (16 USCA §806).*

Con Edison anticipates meeting this deadline by commencing actual construction of Project works on land, without discharging any rock or other materials into the Hudson River, well in advance of October 1, 1974. Once commenced, construction is required to be carried on

* Section 13 provides that an FPC licensee shall "commence actual construction of project works" within two years of the effective date of a license, unless an extension of time is obtained. Such an extension may be granted by the Commission, but only once, and not for a period to exceed two years. Con Edison was granted a two year extension of time to commence construction by the Commission's order of July 25, 1972 (see 48 FPC 147). Construction now must commence on or before October 1, 1974.

The effective date of Con Edison's license is October 1, 1970, which is the first day of the month in which Con Edison's acknowledgment of acceptance of the license was filed in the FPC (see License, Paragraph A (44 FPC at 430)).

"in good faith and with reasonable diligence" (Power Act, §13). However, it will not be possible for the construction work to continue indefinitely, particularly excavation of rock from the powerhouse and tunnels, unless placement of the rock in the recreational park area is authorized in a timely manner. As explained in Mr. McElwee's affidavit (R. 54a-59a), the rock initially excavated from the portal entrance and tunnels will be used to construct the landward portion of the haul road connecting the powerhouse with the park area. In addition, a small amount of the excavated rock could be stockpiled and used as concrete aggregate necessary for construction. Thereafter, by about September 1974, it will be necessary to dispose of this rock in the River at the river part of the haul road site and then at the recreational park site. It is imperative, therefore, that the injunctive decree be reversed promptly in order that construction may be carried on in good faith and with reasonable diligence as required by the Power Act.*

Physically, it would be technically possible to dispense with the park and dispose of the rock elsewhere, such as offshore dumping in the river or placement on land. These alternatives are not economically desirable (R. 56a-57a);

* Con Edison's motion for expedited consideration of the appeal was granted by the Court on March 19, 1974. Con Edison also applied to the Corps on January 11, 1974, for the §404 permit required by the judgment below, entered January 7, 1974. However, processing of the application by the Corps, including preparation of a supplemental Environmental Impact Statement under NEPA (42 USCA 4321) is expected to take until October, 1974, or later. Appeals by Scenic Hudson from issuance of such a permit would, no doubt, consume many more months. The past eleven years of delay show that it would be unreasonable to expect the §404 permit matter to be completed before mid-1975. Construction in the River, if held up this long, would impose severe financial and other unwarranted burdens on Con Edison and the public it serves (R. 59a-60a).

nor are such alternatives legally available since the terms of the license, particularly Article 37 thereof (44 FPC at 435), and §23(b) of the Power Act (16 USCA §816(b)) mandate that Con Edison construct the recreational park.

In contrast to the situation regarding construction of the park, there is no physical alternative to construction of the tailrace cofferdam and transmission line if Project construction is to go forward. Without the tailrace cofferdam, the tailrace cannot be built. The relatively minor back-fill of clean sand over the transmission line trench, furthermore, is vital to protect the costly submarine line from damage.

The facts show that a legal requirement that Con Edison obtain a §404 permit from the Corps will impose duplicative and probably conflicting federal regulation over the Project. Indeed, any such requirement forces Con Edison into an untenable posture. Con Edison will be whipsawed between conflicting directives of the Corps and the FPC and will be exposed to criminal and civil sanctions for inability to comply with one directive or another.* Con Edison maintains that the Corps of Engineers does not and should not properly have jurisdiction with respect to FPC-licensed hydroelectric construction activities, since the terms of §28 of the Federal Power Act protect licenses from subsequent legislation directly affecting the subject

* Jail sentences, fines and civil penalties are among the sanctions for violation of the Water Act (see §309 of 1972 Water Act; 33 USCA §1319). Sanctions for violation of FPC orders also include criminal and civil fines and jail sentences (see §§26, 314, 315, and 316 of the Power Act; 16 USCA §§820, 825n, 825o, and 825p).

matter of the license, and since the 1972 Water Act was not intended to oust the FPC of plenary jurisdiction over the construction of hydroelectric projects.

Summary of Argument

The judgment below should be reversed insofar as it requires Con Edison to seek and obtain a §404 permit under the 1972 Water Act and enjoins Con Edison from carrying on construction activities involving discharges of dredged and fill material into the Hudson River.

The Power Act and the license require Con Edison to build all of the project works as set forth in the FPC license. The FPC's authority is plenary and exclusive. If enactment of §404 and the related provisions of the 1972 Water Act constitutes a partial amendment or repeal of the FPC's exclusive authority, Section 28 of the Power Act prevents such a partial amendment from having retroactive application to the Cornwall Project. Rather than conflicting with the 1972 Water Act, the Power Act, by vesting in the FPC sweeping authority to regulate the issuance of licenses, is consistent with the Water Act, and regulation over hydroelectric projects, including environmental regulation, can and should be controlled exclusively by the FPC, as Congress expressly provided.

ARGUMENT

POINT I

Con Edison's Project License Mandates Construction of the Recreational Park, Tailrace, Transmission Line, and Miscellaneous Structures in the River.

The license and the Power Act plainly mandate that work in the River to build the recreational park, tailrace, transmission line and related features must take place as part of construction of the Project.

Con Edison's FPC license for the Project provides:

"The Commission Orders:

"(A) This license is issued to Con Ed . . . under Section 4(e) of the Federal Power Act for a period of 50 years . . . for the construction, operation, and maintenance of Project No. 2338, to be known as the Cornwall Pumped Storage Project, on the Hudson River . . . subject to the terms and provisions of the Act . . . , and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

"(B) Proposed project No. 2338 consists of:

"(i) All lands constituting the project area and enclosed by the project boundary . . . whether such lands . . . are owned or held by the Licensee . . .

"(iii) The Cornwall project will be a high head pumped-storage development . . . The project will consist of . . . a pumping-generating station . . .

"The pumping-generating station will consist of . . . an underground powerhouse . . . The station will dis-

charge between about 25,000 and 27,000 cfs, and when pumping . . . will draw between about 14,000 and 22,000 cfs . . . [The electricity will be] delivered by . . . submarine cables across the river . . .

"(C) This license is also subject to the terms and conditions set forth in Form L-4 (revised June 1, 1964) . . . (32 FPC 839) . . . and subject to the following special conditions set forth herein as additional Articles:

. . . .

"Article 33. The Licensee shall submit . . . revised exhibits J, L, M and R showing the final designs of the project works and the Licensee shall not begin construction of the project structures until the Commission has approved such exhibits.*

. . . .

"Article 37. The Licensee shall construct and maintain . . . for public use of the recreational facilities, generally as shown in Exhibit R . . . The recreational plan shall include a public boat launching facility for the riverfront park described in Exhibit R."

(44 F.P.C. at 430)

Therefore the provisions of the License expressly require construction of the park, transmission line and tailrace structure (through which the water is discharged and drawn in) as part of the construction of the Project.

The tailrace and transmission line structures

Construction of the tailrace and transmission line structures will involve, principally, excavation of material—not filling (see McElwee Affidavit, ¶¶20, 21, R. 55a-56a). This

* The Commission approved such revised exhibits by order issued February 5, 1974.

excavating activity, by itself, is not subject to the terms of §404, which applies only to the "discharge of dredged or fill material". The term "discharge" is defined in §§502 (12), (16) of the Water Act to mean the "addition" of material to waters, not the taking of material away therefrom.

Present plans call for the material dredged and excavated from the tailrace and transmission area to be placed on top of the rock which will make up the recreational park (see McElwee Affidavit, ¶21, R. 56a). However, there must be a temporary discharge of rock into the cofferdam cells, during construction of the tailrace, and a temporary filling in the river to make a part of the haul road. There must also be a relatively minor discharge of sand to back-fill the transmission line trench. This is plainly construction work authorized by the license.

The park

The recreational park area will be constructed along the river shoreline utilizing the rock excavated from the power tunnel and powerhouse (R. 56a). The park is a Project structure,* and must be built to conform with the

* The Commission's opinion stated, in part, that:

"The proposed project works include . . . riverfront properties . . . which will serve as a spoil area for rock excavated during project construction and then will be filled, compacted, landscaped for park and recreational use, and conveyed to the Village of Cornwall". (44 FPC at 362)

The park will continue as a "project structure" after conveyance to the Village, as indicated in the license, which states that the Project consists of: "All lands constituting the project area . . . whether such lands . . . are owned or held by the Licensee . . .". (44 FPC at 430.)

Project recreational plan, under §10a of the Power Act and under License Article 37 as detailed in Project Exhibit R.*

The park is one feature of the "complete unit of improvement", within the meaning of §3(11) of the Power Act,** and is a "miscellaneous structure . . . useful in connection with said unit" and is "land . . . the use and occupancy of which [is] necessary or appropriate . . .". It will be within the Project boundary (see McElwee Affidavit, ¶¶22 and 23, R. 57a).

It is ironic indeed that Scenic Hudson now contends that Con Edison should not build the recreational park, after ten years of litigation before the FPC where the issues of recreation and scenery have consumed a major part of the controversy (see *Scenic Hudson II*, 453 F.2d at 473-476). Recreational development under §10a of the Power Act is an essential part of the process of licensing an FPC project. The public need for the park is described at length in the Examiner's Report (44 FPC at 479-485). It will allow the general public an advantageous view of the splendor of the Hudson highlands, an opportunity now reserved for the privileged few who own

* Exhibit R is a required part of the Project plans describing recreational features of the Project (see 18 CFR §4.41).

** The Power Act defines the term "project" to mean:

" . . . (a) complete unit of improvement or development, consisting of a powerhouse, all water conduits . . . , and all . . . forebay reservoirs . . . the primary line or lines transmitting power therefrom . . . all miscellaneous structures used and useful in connection with said unit, and all lands or interest in lands . . . which are necessary or appropriate in the maintenance and operation of such unit". (§3(11) of the Power Act)

yachts or shoreline estates. Scenic Hudson has demonstrated, however, that the public necessity for either parks or reliable electric power is not within the scope of its narrow concern.

POINT II

The Power Act Centralized Federal Authority Over Hydroelectric Licensing in the Federal Power Commission to Do Away With Duplication and Piecemeal Approvals With Respect to Hydroelectric Developments.

The District Court's memorandum below (R. 135a) clearly documents that the 1920 Water Power Act was intended to vest exclusive licensing authority, with respect to hydroelectric developments, in the FPC. The Act further denied any other federal agency licensing power over construction of such projects, or parts thereof. Thus, the District Court properly held that:

"... The Federal Power Act preempted the Corps' §10 authority to grant permits for the construction of hydroelectric plants such as the Storm King project and vested sole licensing authority in the FPC, to be exercised (as it was here), with the cooperation and approval of the Corps" (R. 146a).

A. *The Power Act, in vesting plenary authority to license in the FPC, prohibits conflicting jurisdiction by other federal agencies*

The operative terms of the Power Act prohibit conflicting federal agency jurisdiction over FPC projects.

Section 4(e) of the Act provides, in part, that:

"The commission is hereby authorized and empowered—

"(e) to issue licenses . . . to any corporation organized under the laws of . . . any state . . . for the purpose of *constructing*, operating, and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction . . . " (emphasis added)

And Section 23(b) provides:

"It shall be unlawful for any person . . . to *construct*, operate, or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along or in any of the navigable waters of the United States . . . *except under and in accordance with the terms of a permit granted prior to June 10, 1920, or a license granted pursuant to this act . . .*" (emphasis added)

Of particular importance is the absolute prohibition under Section 23(b) against construction of any project works "*except under and in accordance with the terms of a . . . license granted pursuant to this act*". This language, on its face, mandates that the terms of FPC licenses are the sole and exclusive means of regulating licensed project construction. The language leaves no room for conflicting regulation by another federal agency.

The Congressional purpose was clearly to avoid duplicative, overlapping regulatory jurisdiction from other agen-

cies, federal or state. Thus, the House Report on the Water Power bill stated:*

"The [Water Power] bill . . . proposes a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. It provides that the administration of water power within Federal jurisdiction, which have hitherto been handled independently by three separate departments [War, Agriculture and Interior] *in order that duplication may be avoided*, that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of our resources". (emphasis added)

The Congressional purpose to centralize all licensing functions in the FPC is also clearly expressed and main-

* H.R. Report No. 61 on H.R. 3184, 66th Cong. 1st Sess., (1918) reprinted in S. Report No. 180, 66th Cong., 1st Sess. (1919) at 5.

This view received the concurrence of the Secretary of War, the Secretary of Agriculture and the Secretary of the Interior in a letter signed by all three to Representative Sims dated February 27, 1918. 56 Cong. Rec. 2942 (1918).

Similarly, in testimony authorized by those Secretaries, Mr. O. C. Merrill of the Forest Service of the Department of Agriculture said:

"The first step in carrying out the purpose of the bill . . . should consist in coordinating the activities of the three departments which have to do with water power in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions or conflict of authority. It is proposed to accomplish this by the creation of a commission composed of the Secretaries of War, Interior and Agriculture . . ." [i.e.: the FPC]. (*Hearings on S. 1419 before the House Water Power Committee*, 65th Cong., 2nd Sess., at 21).

tained in the Attorney General's Opinions* and a consistent line of definitive judicial opinions over the years.**

As the Eighth Circuit concluded in *Northwest Paper*:

" . . . The various Acts of Congress forming the background for the Federal Power Act of 1920 . . . are indicative not only of an intention to fully develop the water power resources, and to protect the national interest, but of an intention to centralize the authority over such resources in one Government agency . . .

" . . . [The Federal Power Act] was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised . . ."
(*Northwest Paper Co. v. FPC*, 344 F.2d 47 (1965)).

B. The Power Act expressly provides that amendments thereto shall not retroactively affect the rights of licensees under previously issued licenses

One reason for Congress' determination to centralize authority for licensing hydroelectric projects in the FPC was to ensure

" . . . (a) method by which water powers of the country . . . can be developed . . . under conditions which give the necessary security to the capital invested . . . "†

* See 32 Op. Atty. Gen. 525, 528 (1921), quoted in the decision below (R. 144a).

** See cases cited in the decision below at R. 145a-146a, including *First Iowa Hydroelectric Cooperative v. FPC*, 328 U.S. 152 at 180 (1946); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 167-168 (1953); *FPC v. Union Electric Co.*, 381 U.S. 90, 98 (1965); *Northwest Paper Co. v. FPC*, 344 F.2d 47, 51-52 (8th Cir. 1965); *Scenic Hudson I*, 354 F.2d 608, at 613-614; *Scenic Hudson II*, 453 F.2d 463 at 467; see also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), and *FPC v. Oregon*, 349 U.S. 435 (1955).

† H.R. Rep. No. 61, reprinted in S. Report No. 180 at 5. Full citation *supra* at 20.

To provide adequate assurance of the security of capital invested in construction of hydroelectric projects and to attract such investment, Congress provided, in §28 of the Power Act (16 USCA §822):

“That the right to alter, amend, or repeal this Act is expressly reserved; but no such alteration, amendment or repeal shall affect any license *theretofore* issued under the provisions of this Act, or the *rights of any licensee thereunder.*” (emphasis added)

The purpose of §28 is made abundantly clear from the testimony of Mr. O. C. Merrill, a principal draftsman of the Power Act, who stated that*

“Legislation which will permit the financing of water power developments upon favorable terms . . . [is] imperatively needed if our public utilities . . . are to be able to meet the unprecedented demands upon them and at the same time to meet their financial obligations . . .

“While it is essential that waterpower legislation should fully protect the public interests in our natural resources, it is equally essential that adequate protection should be given to the private capital by means of which said resources are developed. It is believed that the bill meets both requirements . . .”

On questioning from the House Water Power Committee, Mr. Merrill expressed the view that an FPC license was a contract between a licensee and the government.

Mr. Esch: “. . . Do you think that Congress can pass no Act within 50 years [the term of a license] that will affect the terms of the license or add to its provisions?”

* *Hearings on S. 1419 Before the House Water Power Committee*, 65th Congress, 2nd Session, (hereafter cited as “Hearings”) at 14.

Mr. Merrill: "I think that it should not have authority to pass subsequent legislation that will modify the contract already executed". (*Hearings*, at 73)

When asked if a new FPC regulation could modify a license already issued, he said:

Mr. Merrill: "I do not think so. It is the intention, and the language is so drafted in connection with the licensing section, that every condition to be imposed upon a licensee shall be expressed in his license, that his full liability shall be expressed in it, and that nothing that may be done subsequently, either by an amendment of this act or by regulations under the act, shall affect the license which has been issued". (*Hearings*, at 99)

Consolidated Edison's investment so far of over \$25 million in the Cornwall Project to obtain the license and perform the necessary engineering is the kind of investment Congress meant to be protected by §28. However, this investment is threatened, contrary to law, by the District Court's interpretation.

In the District Court's view, Congress gave the Corps of Engineers an independent and competing authority to regulate construction of hydroelectric projects. This interpretation not only frustrates the Congressional purpose by diminishing the Congressionally-vested plenary authority of the FPC over hydroelectric development; as applied to prior-licensed projects (such as the Cornwall Project), such authority also violates §28 of the Power Act because it directly and substantially impairs the ability of Consolidated Edison to proceed to construction of the project, thereby directly affecting the very subject matter of the pre-existing license and Consolidated Edison's rights thereunder.

POINT III

Section 404 of the 1972 Water Act Does Not Apply to FPC-Licensed Hydroelectric Projects.

Given the terms of Consolidated Edison's license and the FPC's exclusive authority over the Project as provided by the 1920 Water Power Act, §404 cannot apply to the Cornwall Project without flouting the clearly-manifested purpose of that Act and that license. The correct view is, rather, that far from diminishing the FPC's authority to license hydroelectric projects, the 1972 Water Act on its own terms excludes such projects from its ambit.

A. Section 404

Section 404 is part of the program set up under the 1972 Water Act to regulate pollutant discharges. Section 404(a) of the 1972 Water Act provides that the Chief of Engineers may issue permits for the discharge of "dredged or fill material" into the navigable waters at specified disposal sites.*

Maintaining a distinction between construction and operating activities established in the 1899 Act (§10 and §13

* §404 reads:

"(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

"(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 403(c), and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the

respectively), the 1972 Water Act preserved the Corps' jurisdiction over dredging and filling (§404), and provided for Environmental Protection Agency jurisdiction over discharges associated with operating activities (§402).*

With respect to §404, the legislative history of the 1972 Water Act shows that Congress' principal concern was that

application additionally of the economic impact of the site on navigation and anchorage.

"(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection".

* Section 402 provides in part that: "Except as provided in sections . . . 404 of this Act, the Administrator [of EPA] may . . . issue a permit for the discharge of any pollutant . . . notwithstanding section 301(a), upon condition that . . .".

§13 of the 1899 Act, the "Refuse Act", was, however, superseded as to hydroelectric projects with enactment of the Power Act of 1920, just as was §10 of the 1899 Act.

In essence, the permit system set up under §402, called the National Pollutant Discharge Elimination System (NPDES), is designed to replace the Refuse Act Permit system. The Refuse Act Permit system, which proved unworkable, was set up in late 1970 under an Executive Order (E.O. No. 11574, December 23, 1970, 3 CFR (1970 Compilation) at 188), under which the Corps would issue permits for refuse discharges from non-municipal sources under §13 of the 1899 Act (33 USCA §407). See generally Druley, "The Refuse Act of 1899", Monograph No. 11, BNA Environmental Reporter (Jan. 28, 1972); see also H.R. Rep. No. 92-133, "Enforcement of the Refuse Act of 1899" House Committee on Government Operations, 92nd Cong., 2d Sess. (August 14, 1972); and *U.S. v.*

the Corps should balance environmental needs against the necessity of maintaining navigable ship channels by dredging and disposal of the dredged material. Nowhere in the legislative history of the Water Act does it appear, however, that Congress actually thought about the relationship between the Federal Power Act and the Water Act.** Where express Congressional directives are lacking for cases of apparent conflict, however, generally accepted canons of interpretation require that statutes be read as consistent with each other and in a manner that carries out the intent of Congress in enacting them. This can only be accomplished in this case if the District Court's view of the applicability of §404 is rejected.

B. The terms of §511(a) of the 1972 Act

The question of the applicability of §404 to activities under the Power Act hinges, in significant part, on §511(a) of the 1972 Water Act, which provides:

"This Act shall not be construed as (1) limiting the authority or functions of any other officer or agency of the United States under any other law or regulation not inconsistent with this Act . . ." (33 USCA 1371(a)).

Pennsylvania Industrial Chemical Corporation, 329 F. Supp. 1118 (W.D. Pa., 1971), 461 F.2d 468 (3rd Cir., 1972), *cert. granted*, 409 U.S. 1074, *remanded*, 41 L.W. 4614 (1973).

* See Congressional Service Committee, Library of Congress, "A Legislative History of the Water Pollution Control Act Amendment of 1972" Serial No. 93-1, 93d Cong., 1st Sess. (January 1973), hereinafter cited as "Water Act History".

** A sole exception, §102(b)(6), relates to the use of water stored behind hydro project dams for water quality control. This provision does not apply retroactively, however, to licenses previously granted, although, as to such licenses the FPC retains authority to require operation of constructed projects in a manner consistent with the direction of §102(b)(6).

By the terms of §511(a), the authority and functions of the FPC under the Power Act are not affected by the Water Act to the extent that the Power Act is "not inconsistent" with the Water Act. On the other hand, to the extent the Water Act is "inconsistent" with the Power Act, the FPC's "authority or functions" under the Power Act are "limited" by the Water Act.

The decision below concluded (R. 153a) that the Power and Water Acts are "inconsistent", reasoning that the Water Act mandates, in §404, a degree of regulatory control over dredge and fill discharges not spelled out in equivalent detail in the Power Act, and that, under the Power Act, such control is only "voluntary".

The District Court therefore must have concluded that the FPC's authority under the Power Act was "limited" by §404 and the Water Act generally.*

Indeed, under the District Court's theory, the Water Act has "altered or amended" the Power Act by diminishing the FPC's plenary jurisdiction to regulate hydroelectric projects, a jurisdiction conferred, *inter alia*, in §23(b), which provides that:

"It shall be unlawful . . . to construct . . . any dam . . . powerhouse, or other works incidental thereto . . . except under . . . a license granted pursuant to this Act . . ."

Under the District Court's ruling, the Corps has authority to supersede and override the terms of a license

* A comparable situation is found in a case involving the immigration and selective service laws. See *Application of Mirzoeff*, 253 F.2d 671 (2d Cir., 1958); *In Re Mirzoeff's Petition*, 143 F. Supp. 177 (SDNY, 1956). The earlier selective service law was found to have been partially repealed or altered by a later amendment to the immigration act.

granted under the Power Act, notwithstanding the absolute terms of §23(b): under §404, the Corps could deny a dredge and fill permit in whole or in part; it could forbid Con Edison to place rock along the River shoreline necessary to build the licensed recreational park, and could require more complex, expensive, or time consuming alternatives for disposal of the rock excavated from the underground chambers and tunnels of the Project; it could, finally, prohibit or substantially affect the plans for construction of the tailrace, transmission line or haul road, and, temporarily or even permanently, prevent construction from proceeding.

The District Court's theory, of necessity, is that the Water Act was intended to alter and amend the Power Act and to limit the FPC's formerly exclusive jurisdiction. Con Edison does not challenge Congress' right to alter or amend the Power Act, but it respectfully urges that to interpret such alteration or amendment to apply retroactively, so as to affect Con Edison's absolute right under the license to construct, comes within the ban of Section 28 of the Power Act.

In the District Court's view, Section 23(b) of the Power Act is no longer absolute: its terms "except under . . . a license granted pursuant to *this Act* . . .", are by the court's theory changed to read "except under a license granted pursuant to . . . *this Act and §404 of the Federal Water Pollution Control Act* . . .". In addition, the Court's holding that a §404 permit is required means that the 1972 Water Act directly affected, within the meaning of Section 28 of the Water Power Act, Con Edison's rights under its license, issued August 19, 1970, to construct the Project. As of October 1, 1970, when the Project license became effective, Con Edison was lawfully authorized to go forward with

construction, including work involving the building of the park, tailrace and transmission line.* Two years later, in October 1972, §404 was enacted. At that point, Con Edison's clear right to construct was made subject to the need for another permit from another agency, and Con Edison's licensed right to construct was jeopardized.

The application of §404 to the Project would affect Con Edison's license as follows. A denial by the Corps of a §404 permit application would destroy the FPC's formerly exclusive jurisdiction.** A permit granted on conditions inconsistent with Consolidated Edison's 1970 license would force Con Edison to petition the FPC for an amendment of a license granted before the permit procedure was in existence. The FPC amendment proceeding would no doubt be challenged by Scenic Hudson, which would, no doubt, assert that the FPC is required to make an analysis independent of the Corps';*** the FPC, after independently evaluating the alternatives, could well propose something inconsistent with the Corps permit. At this point it would become necessary to reapply to the Corps for an amendment to the §404 permit. The process could be endless: the Court's opinion condemns Con Edison, like Sisyphus,

* Construction has been delayed extensively by reason of litigation instituted, mostly, by Scenic Hudson. Meanwhile, due to inflation, project costs have soared, as have the costs of alternatives. (See McElwee Affidavit, R. 59a-60a).

** Scenic Hudson, in fact, has recently asserted in a letter of March 8, 1974 to the Corps of Engineers that the Corps' public hearings on the §404 permit application should, in effect, reconsider not only issues directly related to the discharge of the rock, but also the entire range of issues, including project economics, gas turbines and the need for the Project, already considered and determined by the FPC in eleven years of proceedings.

*** See *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir., 1971).

to a perpetual cycle of filing applications with the Corps and with the FPC. It was precisely nightmares of this sort that Congress expressly sought to avoid by vesting exclusive jurisdiction in the FPC.*

These considerations demonstrate that, even assuming *arguendo* that there is an "inconsistency" between the two acts, the prohibitions of the Power Act against abating the FPC's plenary authority and against future alterations of the license must come into play to protect Consolidated Edison's license. With §28, the Congress of 1920 expressly bound the Congress of 1972 from altering or affecting Con Edison's 1970 license. If the Congress of 1972 had the power and intention to affect the licenses previously issued by the FPC, §28 would operate to require it to do so expressly, and not, as the District Court would have it, by implication.

The District Court, however, far from according due weight to §28, lightly brushes it aside and, in effect, renders it a nullity. The Court's memorandum merely makes the unsupported assertion that the 1972 Water Act is a "law of general application" and that §28 is intended only to protect licensees from "any ex-post facto law-making relating specifically to FPC license requirements". The court holds, then, that §28 amounts to no more than a narrow and needless reiteration of the constitutional prohibition against ex-post facto laws. As discussed above, however, the true purpose of §28 is to secure licensees against subsequent amendments, whether such amendments

* The express legislative intent to avoid duplication is set forth in both the Power Act (see *supra* at 20) and in Section 101(f) of the 1972 Water Act, which states, in part:

"(f) It is the national policy . . . to prevent needless duplication and unnecessary delays . . ."

may be characterized as "general" or "special", which conflict with specific directives of an issued license. That situation is present here. In this case, Con Edison is licensed and required to build project works, including the park. Article 37 and Exhibit R require that the park be constructed by placing, or "discharging", rock in the River. Article 37 and Exhibit R, then, conflict directly with §404; such conflicts were anticipated and provided for by Congress in 1920 by the enactment of §28.*

Con Edison does not read §28 so broadly as to contend that §28 frees a licensee from the fetters of all subsequent legislation. A licensee would clearly be subject to tax laws, labor laws, and other such laws enacted after issuance of the license. But neither does Con Edison read §28 so narrowly as to render its protections meaningless. Only specific subsequent legislation which conflicts directly with the FPC's expressly licensed comprehensive plan of regulation is proscribed. The guiding rule should be the protection of the licensee's rights in the very subject matter of the license.

Nor does Con Edison urge that hydroelectric projects be unregulated insofar as pollution control and the environ-

* The same threat of undermining the FPC licensing procedure is posed by §402 of the 1972 Water Act, the operating discharge permit provision. If §402 were to be determined to apply to previously constructed and currently operating projects, the entire system of FPC project licenses will have been undermined. Application of §402 to hydroelectric projects would authorize the EPA to impose an entirely new system of controls over river flows discharged from hydroelectric turbines. This would duplicate the existing FPC authority under all project licenses issued to date. The §402 permits (NPDES permits) can be issued for five years only (see §402(a)(3) and §402(b)(1)(B)). The Power Act licenses, on the other hand, are issued for 50 years (Power Act, §6). Thus, a 50-year license, with the investment thereby induced, would under the NPDES system, be jeopardized every five years.

ment is concerned.* Such regulation should by law, however, take place within the framework of the Power Act and the applicable license conditions.

There is ample authority for the FPC to accomplish this. Under the Power Act, the FPC has power to regulate and control all aspects of hydroelectric project licensing, construction and operation.** That is, contrary to the District Court's view, the Power Act and the 1972 Water Act are "consistent" and can be easily and fairly accommodated to each other.

The ample existing authority of the FPC to regulate the conditions of a license means that the Power Act is in

* Hydroelectric plants do not discharge chemicals or heat into the water. They discharge river water as it is found in the stream, polluted or unpolluted. The Cornwall Project will not affect water quality in the Hudson. See *deRham v. Diamond*, 32 N.Y.2d 34 (1973). Shellfisheries providing clams, oysters, scallops and the like are not found in the Hudson River at Cornwall, where the water is both fresh and saline, depending on the season of the year. Reported studies substantiate the absence of shellfish beds in the area (see Consolidated Edison Company of New York, Inc. Final Environmental Impact Statement, Indian Point Generating Station Unit 2 (September 1, 1972), at 11-32, 33. See also Hirschfeld, Rachlin and Laff, "A Survey of the Invertebrates from Selected Sites of the Lower Hudson River", *Hudson River Ecology*, Hudson River Valley Commission of New York, 1966). Plaintiffs' papers do not appear to assert that shellfish beds would be affected by construction of the Project. The absence of an extensive study in the record of the Project's impact on shellfish is due to the fact that there was clearly no need for such a study. Likewise, the record has no study of the Project's impact on the siberian tiger or the earthworm. We think it can be conceded that tigers are not indigenous to Storm King, and that, while building Cornwall will, no doubt, kill some earthworms, the loss should not be sufficient to warrant rational concern.

** See, e.g., Power Act §10(b) and (c) (16 USCA 803(b), (c)), and see Terms and Conditions of License, Articles 1-29 (32 FPC 839) and Cornwall Project License, Articles 30-39 (44 FPC at 430-36).

fact "consistent," (within the meaning of §511(a) of the 1972 Water Act) with the 1972 Water Act. This means, in turn, that the FPC's authority under the Power Act, and the rights of its licensees, thereunder, are not "limited" or affected, and that the whipsawing to which the District Court would subject FPC licensees is not a result dictated by law. A finding of consistency, under the terms of §511(a), subjects licensees to the sole authority of the FPC, thereby serving the Congressional purposes in enacting the Power Act.

This conclusion is consistent with a case in which Congress *did* foresee a conflict, and reached a result similar to the one urged here by Con Edison. In drafting the 1972 Water Act, Congress specified that the AEC should retain its exclusive jurisdiction with respect to "special nuclear" and "by product" materials, and that the EPA should not have jurisdiction.* Its purpose was to avoid duplication and conflicting agency regulation.** Accordingly, it was recently held that the Water Act permit system is not applicable to materials within the AEC's exclusive jurisdiction.***

Congress failed to recognize that the same kind of conflict would exist between the 1972 Water Act and the Power Act and licensees thereunder. If it had anticipated this conflict, it would no doubt have resolved it in a manner similar to that involving the AEC, and expressly preserved

* For the AEC's pre-emptive jurisdiction in these areas, see *Northern States Power Company v. Minnesota*, 447 F.2d 1143 (8th Cir., 1971) *aff.* 405 U.S. 1035.

** See Water Act History, cited *supra* at 23, at 818, 1266.

*** *Colorado Public Interest Research Group, Inc. v. Train*, Civil Action No. C-5438 (D. Ct. Colo. February 15, 1974).

the FPC's exclusive jurisdiction. The AEC example demonstrates that the Congressional strategy was clearly to avoid duplication and to retain exclusive agency authority where it existed.

C. *A §404 permit is not required for the Cornwall Project*

Whether the 1920 Water Power Act is consistent or inconsistent with the 1972 Water Act under §511(a), a §404 permit is not required for the Cornwall Project. If there were an inconsistency, the effect would be to alter or amend the Power Act; under §28 of the Power Act, however, no such alteration or amendment can affect Con Edison's 1970 project license without flouting the intent of Congress to provide a unitary and plenary licensing mechanism and without substantially "affecting" the licensee's pre-established rights.

If there is consistency, a result suggested by the AEC case, urged by logic, and necessary if the two Acts are to be accommodated, then the 1972 Water Act does not apply to licensed FPC projects under §511(a). The result is that the FPC retains its exclusive jurisdiction, and regulates the subject matter of the 1972 Water Act within the broad scope of the Power Act. In this way the purpose of Congress is achieved without the administrative duplication which would result if the 1972 Water Act were directly applicable. Congress clearly had no intention of limiting the long standing exclusive jurisdiction of the FPC.

CONCLUSION

Paragraphs 2 and 3 of the Judgment below should be reversed, and a declaratory judgment should be entered in lieu thereof that Con Edison is not required to obtain a permit under §404 of the 1972 Water Act in connection with construction of the Cornwall Project, or any part thereof.

Respectfully submitted,

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Dated: March 22, 1974

Of Counsel:

CARL D. HOBELMAN
 G. S. PETER BERGEN
 ANDREW GANSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

SCENIC HUDSON PRESERVATION :
CONFERENCE, et al., :

-against- :

HOWARD H. CALLAWAY, et al., :

and :

CONSOLIDATED EDISON COMPANY :
OF NEW YORK, INC. :

- - - - -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Case No. 74-1311

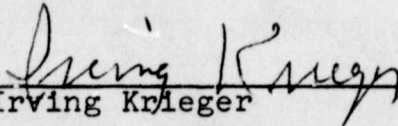
AFFIDAVIT OF
SERVICE

IRVING KRIEGER, being duly sworn, deposes and says:

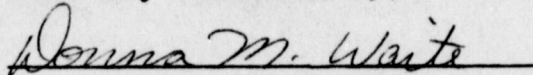
1. That he resides at 2260 Benson Avenue, Brooklyn,
New York, that he is over the age of 18 years and is not a party
to this action;

2. That on March 22, 1974 he personally served copies
of the foregoing Brief of Consolidated Edison and the Joint
Appendix thereto upon the following attorneys of record (or
persons of suitable age and discretion at their offices) in this
proceeding at the following addresses:

- 1) Albert K. Butzel, Esq.
Berle Butzel & Kass
425 Park Avenue
New York, New York 10022
- 2) David Sive, Esq.
Winer Neuburger & Sive
425 Park Avenue
New York, New York 10022
- 3) Paul J. Curran, Esq.
United States Attorney
United States District Courthouse
Foley Square
New York, New York 10007
Att: T. Gorman Reilly, Esq.


Irving Krueger

Sworn to before me this
22nd day of March 1974


Donna M. Waite

DONNA M. WAITE
Notary Public, State of New York
No. 24-4125130
Qualified in Kings County
Term Expires March 30, 1975